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**MEDIATION IN THE PACIFIC: RESOLVING CROSS-
BORDER COMMERCIAL DISPUTES**

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Abstract

Mediation is developing and increasingly becoming one of the most popular modes for resolving international commercial disputes worldwide. In the Pacific, mediation has also been introduced to resolve disputes and lessen the burden of the Courts with case backlogs and assist in the improvement of the business environment in the Region. Prior to the introduction of western systems of resolving disputes such as litigation, arbitration and mediation, Pacific Island Countries had their own traditional methods of resolving customary disputes. This paper therefore aims to study these methods and determine whether mediation is culturally fitting and whether mediation is the appropriate mode to resolve commercial disputes or cross-border commercial disputes in these countries. Further, it will address whether introducing more traditional customs into the mediation rules that were introduced and developing the rules to suit these societies, would have any benefits in resolving commercial disputes.

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I Introduction

Resolving a business dispute in the courts of many Pacific Island countries has become a very lengthy and expensive exercise¹. Efficient contract enforcement is essential for a business friendly environment and it reduces informality, improves access to credit and increases trade.² Studies have shown that an efficient justice system is fundamental in reducing business risks and improving the business climate in emerging market economies.³ In 2008, to improve climate investment in the Pacific region, the International Finance Corporation (IFC) and World Bank⁴ introduced a mediation program.⁵ The program was introduced in five Pacific Island countries, Papua New Guinea (PNG), Samoa, the Solomon Islands, Tonga and Vanuatu. The IFC and World Bank partnered with the courts and Ministry of Justice in these countries to prepare the investment climate, and support the infrastructure and legislation for the mediation program.⁶ Since its introduction, there has been significant progress in all these countries⁷ and it is the thesis of this paper that mediation is appropriate and will be the most effective in resolving contract disputes, for cross-border disputes in the region.

The International Chamber of Commerce defines mediation⁸ as a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute. Various forms of mediation to settle disputes have existed in all cultures since ancient times.⁹ Mediation, including other modes of settling disputes, has existed to resolve simple disputes such as property rights to the current complex disputes involving international commercial transactions.¹⁰ There is even strong evidence of the existence of mediation in many traditional societies which though they were not formal state systems and legal

¹ International Finance Corporation “IFC helps Pacific Islands to Resolve Disputes Faster by Supporting Mediation” <www.youtube.com>.

² Doing Business “Enforcing Contracts-Doing Business” (2014) <www.doingbusiness.org> at 110.

³ World Bank Group “Alternative Dispute Resolution Guidelines” (2011) <http://sitesources.worldbank.org> at V.

⁴ Above.

⁵ International Finance Corporation, above n 1.

⁶ Above.

⁷ Above.

⁸ International Chamber of Commerce “ICC International Chamber of Commerce for ADR” <www.iccwbo.org>.

⁹ Laurence Boulle, Virginia Goldblatt and Philip Green *Mediation: Principles, Process, Practice* (2ed, Lexis Nexis NZ Limited, Wellington, 2008) at 41.

¹⁰ Cyril Chern *Commercial Mediators Handbook* (Ringgold, New York, 2015) at 29.

institutions they were well-organised systems that managed conflict within families, clans, tribes and villages.¹¹ Mediation in these traditional societies was not only used for settling disputes but was also used to strengthen social values, social unity and maintain a state of social order.¹² In the Pacific most societies have practiced many forms of alternative dispute resolutions for many centuries without being familiar with the concept.¹³ The analysis in this paper is on the traditional methods applied in Pacific Island countries in traditional disputes and to compare them with the principles of modern mediation to determine how similar they are to the principles of mediation that have been introduced into legislation.

Chapter III will discuss legislation that made provision for mediation prior to the introduction of Mediation Rules in Pacific Island Countries and the application of the custom to resolve all types of disputes. Chapter IV discusses PNG and Samoa that have been chosen as case studies to analyse the traditional methods of resolving traditional disputes and the mediation rules that have been introduced in their countries and determine whether they have incorporated their customs into their rules. This chapter will also determine whether recognising custom and introducing traditional methods in the mediation rules would be disadvantageous in cross-border commercial disputes and Chapter V discusses the enforceability of these type of disputes. The challenges these Pacific Island Countries are experiencing in enforcing mediation settlement agreements and what can be done to assist these countries with enforcing their agreements.

II Why Mediation?

The promotion of mediation has not only been in the Pacific Region but has been promoted worldwide.¹⁴ It has gained preference in the corporate world particularly because of the rising costs, delays and procedural formality that are experienced with other of modes of settling disputes such as arbitration and litigation.¹⁵ Additionally, in the last decade, there has been a dramatic increase in the number of countries who have recognised the

¹¹ Boule, above n 9 at 42.

¹² Boule, above n 9 at [42 -44].

¹³ Graham Hassall "Alternative Dispute Resolution in Pacific Island Countries" (2005) 9(2) JSPL 1.

¹⁴ S.I. Strong "Beyond international commercial arbitration? The promise of international commercial mediation" (2004) 45 WUJLP 11.

¹⁵ Above.

importance of mediation as an alternative means of settling disputes and have reviewed, amended or enacted legislation accordingly.

In Europe, in May 2008, the European Mediation Directive of 2008 was adopted which promoted mediation as an alternative means of out of court settlement for cross-border civil and commercial disputes.¹⁶ All member states, excluding Denmark who opted out of the Directive, were required to transpose the Directive into legislation, regulations and administrative provisions by May 2011.¹⁷

In the United States (US), mediation has been visible as an alternative mode for the last 40 years and has been used as a court-connected program to promote negotiation or mediated settlement of litigated cases because of perceived risks, delays and high costs of litigation.¹⁸ However, there have been significant developments in the techniques practiced and also an increase in the number of contracts that include mediation for stepped procedures for resolving disputes.¹⁹ In 2011, the Fortune 1000 Corporate Society Counsel Survey conducted in the US,²⁰ interviewed general counsels from 1000 of the largest US companies. Out of the 362 participants, nearly all confirmed that their, company had used mediation and that it was frequently used to resolve a broad range of business disputes.²¹ Furthermore, the majority responded that there was a strong likelihood of participating in mediation in the future.²² In the Asia-Pacific Region, a 2013 survey conducted by the International Institute for Conflict Prevention and Resolution²³ showed that mediation was the preferred mode to arbitration. The main reason for the slight preference for mediation over arbitration in the Asia-Pacific Region was because it helped to preserve relationships.²⁴

¹⁶ Thomas J Stipanowich “The International Evolution of Mediation: A Call for Dialogue and Deliberation” (2015) 46 VUWLR 1191 at 1197.

¹⁷ Klaus J Hopt and Felix Steffek *Mediation Principles and Regulation in Comparative Perspective* (Oxford University Press, Oxford, 2013) at 3.

¹⁸ At 1193.

¹⁹ At 1194.

²⁰ Anne. K.C. Koo “UNCITRAL and International Commercial Mediation in China’ in MP Ramaswamy and J Ribeiro (eds), *Trade Development Through Harmonisation of Commercial Law* (Comparative Law Journal of the Pacific, forthcoming) at 1.

²¹ Stipanowich, above n 16 at 1195.

²² Above.

²³ Koo, above n 21 at 4.

²⁴ Above.

The major reason mediation is becoming a popular mode for resolving disputes is because of the perception that it is quicker and more cost effective.²⁵ However, some empirical research²⁶ has suggested that it reduces clients cost by only about half of the disputes and for international commercial disputes there is even less probability that it would save time and money.²⁷ Even though mediation may not save time or costs, there are other reasons why mediation has received greater attention in resolving disputes and they are: it provides parties with the opportunity to manage their disputes efficiently, informally and consensually;²⁸ it is entirely flexible and can be adapted to meet the particular needs of parties and their circumstances;²⁹ it can overcome cultural barriers, improve communications, restore and maintain relationships; promote confidentiality and produce more creative, satisfactory and durable resolutions.³⁰

For the Pacific, the main reasons for the use of mediation has been to particularly improve the efficiency of the judiciary and the business environment in the region. Mediation has been promoted because of the presumption that it can save time and costs; studies have shown that it has been effective in assisting to reduce the backlog and save costs, which are quite positive aspects. It is, however, argued that there is another factor as to why mediation is effective in the region and that is because of similarities it has to the customs and traditions of the Pacific Island Countries in resolving disputes. Thus, this similarity has made it easier for parties to adopt these systems and use it to their advantage. There is limited data on the customary practices in most countries in the region to compare the similarities, however, from a few countries that research has been conducted, the principles and models of mediation will be analysed and compared. This is to determine whether these traditional customs are similar to the mediation principles and thus why mediation has been effective in resolving business disputes both at the international and domestic levels.

²⁵ Chern, above n 10 at 30.

²⁶ Strong, above n 14 at 11.

²⁷ Above.

²⁸ Stipanowich, above n 16 at 1192.

²⁹ Chern, above n 10 at 34.

³⁰ Stipanowich, above n 16 at 1192.

A *Definition of Mediation*

Mediation operates in different legal and social contexts and is used by different groups for different purposes.³¹ Because of its diversity in practice and the different models it poses, it has been difficult to describe or define precisely.³² Various statutes and court decisions also provide different viewpoints and elements in the definition of mediation.³³ The mediation discipline has developed largely from theories of other disciplines such as law, psychology and anthropology,³⁴ and it is yet to develop its own theories that can be explained or justified as deriving strictly from the attributes of mediation discipline and can be differentiated from the other disciplines.³⁵ Other reasons have been because mediation is conducted in private and on a confidential basis, it has been difficult to obtain first-hand information about what occurs during the mediation process.³⁶ This aspect, has, however changed due to the number of surveys, case studies and references in case law that discuss what transpires during the mediation process.³⁷ Another reason are the terms and language used to define or describe mediation. These terms are flexible, are of an open-ended nature and also evolving and therefore cannot provide a definite meaning to mediation.³⁸ The term “mediator neutrality” is one such example which is a term used in many definitions of mediation that has several shades of meaning.³⁹ In the broad sense it means that the mediator has no direct interest in the outcome of the matter or will not use his or her expertise to influence the decision making process.⁴⁰ However, in practice depending on the context and the circumstances of the case not all mediators are neutral in all aspects.⁴¹

In addition, there has been considerable development in the techniques that mediators use;⁴² the areas in which it is being used as the preferred mode for resolving disputes;⁴³ the

³¹ Boule, 9 above at 5.

³² At [3-6].

³³ Hopt, above n 17 at 11.

³⁴ Boule, above, n 9 at 4.

³⁵ Above.

³⁶ Boule, above n 9 at 4.

³⁷ Above.

³⁸ Above.

³⁹ Laurence Boule Virginia Goldblatt and Philip Green *Mediation: Principles, Process, Practice* (Butterworths, Wellington, 1998) at 10.

⁴⁰ Above.

⁴¹ Above

⁴² Anthony Connerty “Alternative Dispute Resolution in Small States for the Legal & Constitutional Affairs Division of the Commonwealth Secretariat” (2008) 34 (2) CLB 365.

⁴³ Peter Spiller *Dispute Resolution in New Zealand* (2ed, Oxford University Press, Melbourne, 2007) at 69.

culture and the context in which it has been applied have also changed significantly.⁴⁴ What has remained constant throughout the development of the practice and processes of mediation has been a few essential principles which assist in understanding the mediation practice and procedure and are described as core features.⁴⁵ Furthermore there are mediation models that show some or all of these core principles and which also contribute to explaining the mediation process.

B Core Features

In mediation, although there are different types of models with features that may vary from one model to another, there are a few core features that are common in all models and which are described below:

1 Consensual nature

In mediation, this feature is recognised as crucial to the process and is known as the principle of the voluntariness to settle a dispute.⁴⁶ Previously parties' willingness to engage in mediation was voluntary, however, today this is now limited in some jurisdictions⁴⁷ where courts can compel parties to mediate, a contract can require parties to mediate or it is required by legislation.⁴⁸ In all formal legal systems, however it is still agreed that it is fundamental that the decision as to whether there will be an agreement to settle at the end of the process rests upon the parties.⁴⁹ This feature distinguishes mediation from other processes such as arbitration or litigation where a third party is empowered to make a binding determination.⁵⁰ The essential element, whether or not parties engaged in the process voluntary,⁵¹ is the parties' discretion to accept or reject an outcome that they decided upon and are prepared to live with the consequences.⁵² How independent parties are in making their decision depends on the type of mediation model applied and the role the mediator plays.

Parts of the Pacific show similarities to the principle of voluntariness. In Samoa, the customs portray a system emphasising consensus resolution which satisfies all parties,

⁴⁴Stipanowich, above n 16 at 1200.

⁴⁵ Spiller, above n 43 at 79.

⁴⁶ Hopt, above n, 17 at 109.

⁴⁷ Spiller, above n 43 at 73.

⁴⁸ Above.

⁴⁹ Hopt, above n 17 at 12.

⁵⁰ Boule, above n 18 at 9.

⁵¹ Spiller, above n 43 at 73.

⁵² Boule, above n 9 at 34.

however, the main difference would be that the final decisions are made by the chiefs (*matai*).⁵³ In PNG conflicts were resolved by consensus,⁵⁴ For example in Y clan of Madang province,⁵⁵ if there was a dispute over a death or theft, whether serious or not, a middle man, who was the headman in the village would be called in or would intervene and help parties resolve the dispute. The parties would meet separately and the middleman would assist parties with negotiations and would advise each side about offers and counter offers until they came to an agreement.⁵⁶ In the X clan of Enga Province in PNG, a *kainakali* (middle man) was appointed to help resolve disputes.⁵⁷ He was from a neutral clan and was appointed to help the disputing clans and where disputing parties would air out their differences and which couldn't be disclosed to other parties unless they agreed to do so⁵⁸. A *kainakali* was chosen because of his skills to negotiate and which he would help parties to find solutions to their problems⁵⁹. The only difference and which is more similar to the Samoan culture is that he would make the final decision⁶⁰.

Accordingly, the above cases demonstrates the principle of voluntariness of parties involved in a dispute to come together to resolve disputes and show that there was a consultative approach between all parties. Whether the decision was reached by the parties or that it involved a third party making a final decision, there is the feature of willingness to resolve a dispute and consult each other about what the outcome should be. The above case studies feature similar characteristics to the mediation process and show how some people in the Pacific are already familiar with the concepts of mediation and could easily accept the process. On the issue of determining the outcome themselves which may be new to some parties such as the Samoan's and the X clan, mediators are trained to assist parties in the process and guide them through the process and therefore mediators could assist in this aspect. Furthermore, depending on the mediation model applied. In some cases, the mediator could provide advice to assist parties to make a decision. Therefore it is up to

⁵³ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Pjdp Phase 2: Customary Dispute Resolution Research Project" (Pacific Judicial Development Programme, March, 2012) Annexure 1: Country Report Samoa at 15.

⁵⁴ Ambeng Kandakasi "ADR/Mediation as a Nation Building Tool" (paper presented to the National Mediation Conference, Australia, 2012) at 12.

⁵⁵ Michael L. Murphy "Cross Pollinating Conflict Resolution: The Accredited Local Mediator's Role within PNG's Hybrid Dispute Resolution Forums: A Report to the Papua New Guinea Supreme and National Court Alternative Dispute Resolution Committee 9 August 2013" (Fulbright Scholar in Law, 2013) at 26.

⁵⁶ At [27-28].

⁵⁷ At [18-19].

⁵⁸ At [19-20].

⁵⁹ At 19.

⁶⁰ At 20.

parties to choose the model that would be more suitable to them especially in terms of how independent they want to be in making their own decisions.

2 Confidentiality

Confidentiality is a feature used in mediation to promote the mediation field⁶¹ and is used as an incentive to invite parties to attempt to resolve their disputes through consensual means.⁶² This principle provides parties with the opportunity to disclose information to the other party and the mediator, which they would not do in a public hearing and it could provide possible solutions to the dispute.⁶³ Although, this is one of the features promoted in mediation, stipulated in legislation and in agreements to mediate, realistically there are limits as to how confidentiality can be maintained.⁶⁴ In law, there are limits to privacy, confidentiality and ‘without prejudice’ features of mediation. Courts today are requiring even more than before for the disclosure of mediation communications.⁶⁵ Boulle, Goldblatt and Green state:⁶⁶

From the perspective of the legal system there are two competing principles in relation to the nature of mediation. The first is the value of upholding confidentiality to encourage effective non-litigious settlements and avoid litigation and the second is the value of all relevant evidence being available to judges and tribunals regardless of whether or not it has been adduced in mediation.

The above shows the challenges with the concept of confidentiality. It should be noted that different jurisdictions might regulate on confidentiality differently.⁶⁷ The European Directive, for instance, stipulates that submissions or information given during mediation cannot be used against any party in any subsequent judicial proceedings should the mediation not be successful.⁶⁸ In the United Kingdom, the rule is that any disclosure or inspection of evidence arising out of, or in connection with mediation and in the control of the mediator or someone involved in the administration of the mediation may be permitted

⁶¹ Boulle, above n 9 at 345.

⁶² Spiller, above n 43 at 75.

⁶³ Hopt, above n 17 at 49.

⁶⁴ Spiller, above n 43 at 75.

⁶⁵ Boulle, above n 9 at 346.

⁶⁶ Boulle, above n 9 at 346.

⁶⁷ Chern, above n 10 at 32.

⁶⁸ Above.

only in accordance with an order of the Court.⁶⁹ The order, however, will be granted if all parties agree, disclosure is required under public policy or is necessary to enforce the mediation agreement. On an account of this and the complexities on the law of confidentiality, mediators are therefore advised in the interest of protecting themselves, their parties and the reputation of the mediation process to be honest about the extent of the confidentiality provisions.⁷⁰ To provide an example of where customary dispute resolution processes feature the principle of confidentiality. In the X and Y clans of PNG⁷¹, disputing parties' information was kept confidential by the headman or *kainakali* unless the parties agreed to disclose their information for the purposes of negotiation with the other side. Thus this shows that there are some societies in the Pacific that are familiar with this principle.

3 *Caucusing*

Caucusing is the holding of separate meetings with one party in the absence of the other party or parties and is an essential feature in mediation.⁷² It provides an opportunity for one party to disclose sensitive information to one party, which the mediator may use to assist that party to develop possible solutions. Originally caucusing was seen to be appropriate in a particular stage of the meeting; however, current practice shows that it can happen at any stage. In a recent survey conducted by the International Academy of Mediators and Straus Institute for Dispute Resolution (IAM Survey/Straus Institute Survey),⁷³ which interviewed 153 mediators, comprising of mediators from the US and outside the US but most interviewed were predominately from the US.⁷⁴

It revealed that approximately 40% of all mediators begin mediation with private meetings but the majority begin with a joint session.⁷⁵ In another part of the data in reference again to caucus and joint sessions, the survey showed that about a quarter of all mediators kept parties in caucus during the entire mediation process and slightly more than that, about 30% of all mediators never did so.⁷⁶ This data provides an example of how diverse the mode of caucusing can be and that there is no set single process for how mediators apply

⁶⁹ Above.

⁷⁰ Spiller, above n 43 at 75.

⁷¹ Murphy, above n 55 at [20,27 and 28]

⁷² Spiller, above n 43 at 77.

⁷³ Stipanowich, above n 16 at 1195.

⁷⁴ At [1195-1195].

⁷⁵ At 1204.

⁷⁶ Above.

this principle. What is significant about this process is that it is a tool mediators can use to help parties communicate when they are aren't comfortable sharing information with the other party or when there is an impasse which then allows parties to cool off and the mediator to deal with the issue separately with each party to consider whether it can be resolved or not.⁷⁷

The Samoan village council decision-making process did apply the principle of caucusing, although not in the strict sense as has been provided in the definition above but where it involved the deferment of meetings. What is similar however was that meetings were deferred where a consensus could not be reached. This provided more time for the matai to discuss options with family members and consider the options available.⁷⁸ For the Samoans participating in mediation, they would be familiar with the process of caucusing. In addition, for people in societies in the region who are used to non-confrontational approaches, the principle of caucusing would be a beneficial tool as they would be able to tell the mediator how they feel if they are unable to tell the other party in a dispute. In the small island communities of Federated State of Micronesia, research showed that these islanders were not familiar with the system of adversarial characteristics and were uneasy with confrontational approaches.⁷⁹ Thus, characteristics such as caucusing would suit these people better and the mediator's role during these private meetings would be to encourage people such as from FSM to state their position and views during joint meetings.

4 Neutrality/Impartiality

The features of neutrality and impartiality in mediation are regarded as complicated as the definitions for these terms continue to evolve.⁸⁰ In most definitions defining mediation, the mediator is referred to as the 'third party neutral' and also in many codes of conduct 'mediator neutrality' is referred to when discussing the issue of neutrality.⁸¹ In mediation, the extent to which a mediator is actually 'neutral' has been a heavily debated topic.⁸² It has been said that in providing a definition for neutrality, dictionaries always include the term impartial and therefore in the assisting to differentiate between neutrality and

⁷⁷ Spiller, above n 43 at 78.

⁷⁸ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 1: Country Report Samoa," above 53 at 12.

⁷⁹ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 2: Federated States of Micronesia Country Report," above n 53 at 8.

⁸⁰ Spiller, above n 43 at 79.

⁸¹ Boule, above n 9 at 24.

⁸² Spiller, above n 43 at 79.

impartiality.⁸³ Boulle, Goldblatt and Green⁸⁴ for instance have explained ‘neutrality’ in three senses. Firstly neutrality in the sense of disinterested,⁸⁵ this is where mediators can be neutral when they have no interest in the outcome of the matter, neutrality in the sense of independence,⁸⁶ the mediator has no prior relationship with the parties in dispute and thirdly neutral in the sense of impartial,⁸⁷ this is where mediators are neutral in how they conduct the process, which is fair, and without bias to other parties.

In practice, however, applying the principle of mediator neutrality is quite challenging.⁸⁸ For example, parties may choose a mediator who is interested in the matter or parties may waive this aspect of neutrality and select mediators who use their judgment and some persuasion in shepherding the parties to an objectively appropriate outcome.⁸⁹ Therefore, in recent years due to critique about the term neutrality in theory and practice it has been omitted.⁹⁰ The National Mediator and Accreditation System in Australia is one such example who has omitted the definition.⁹¹ Nevertheless, it is still used as a guiding principle by mediators and to gain accreditation mediators are expected to demonstrate their ethical understanding of the terms ‘neutrality’ and ‘impartiality’.⁹² How neutral a mediator is depends on the context and the circumstances of the case and therefore the application of this feature in mediation is not as strict as impartiality. Impartiality is an absolute requirement and is an ethical requirement in the mediation profession.⁹³ A mediator is required at all times to be fair during the whole mediation process: towards parties in time allocation; facilitation of communication; providing equal attention to both sides; consistency with guidelines and without displaying any sign of favouritism. Consequently, it has been stated that because of the complexities of defining and distinguishing the terms, mediators are recommended to always remain independent of the parties’ positions and the substance of the dispute.⁹⁴

⁸³Boulle above n 9 at [24-29].

⁸⁴ Above.

⁸⁵Boulle, above n 40 at 25.

⁸⁶Boulle, above n 40 at 25.

⁸⁷Boulle at 25.

⁸⁸Susan Douglas “Neutrality, Self-Determination, Fairness And Differing Models Of Mediation” (2012) 19 JUCLR 19 at 20.

⁸⁹ At 27.

⁹⁰ At 20.

⁹¹ Above.

⁹² Above.

⁹³ At 28.

⁹⁴ Spiller above n 43 at 80.

In the Pacific, customs vary and therefore it is quite difficult to provide a general view on whether or not the principles of impartiality and neutrality are applied based on a few customs. However, for the cultures that have a chiefly system, the chiefs are very influential in resolving disputes and are usually involved in the decision making process and are neither impartial nor neutral. For instance in (FSM), in custom, involving a non-serious criminal matter, the victim and the offender did not play a role, they subjected themselves to the wishes of the head of the family.⁹⁵ The negotiation process between the respected heads of the family was facilitated by chiefs.⁹⁶ The chiefs played an important role in determining whether they could resolve the disputes; or should be referred to more senior chiefs; or enter the formal system.⁹⁷ In Samoa, although decisions are made in a consultative nature, it has a chiefly system where the final decisions are made by the high chiefs.⁹⁸ Both these customs are rather determinative or advisory but it has been said that even in mediation, it is still challenging for a mediator to remain neutral especially where parties request an opinion; choose a mediator based on their interest in the matter; or persuade parties to make a decision. Therefore these people's needs could be accommodated as mediation is a practice that is flexible and can be applied to suit a particular case.⁹⁹ This may be an issue where the dispute involves parties who are from a non-adversarial system in which people are not used to a third party making the decision for them. Parties would have to agree on the role they would like the mediator to play if both parties have different views on the process and particularly if they would like to resolve their dispute. In Samoa, Samoans are used to their chiefs providing advice or even making decisions and these customary systems portray the adversarial system of resolving disputes. However, since the Mediation Rules were introduced in 2013, 70 to 75% of cases that have gone through mediation have been successful.¹⁰⁰ This shows that people in Samoa have adapted to the mediation process and are learning how to make decisions on their own without third party influence.

⁹⁵ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 2: Federated States of Micronesia Country Report" above n 53 at 23.

⁹⁶ Above.

⁹⁷ Above.

⁹⁸ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 1: Samoa Country Report CDR," above n 53 at 17.

⁹⁹ Above.

¹⁰⁰ Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

In regards to mediators being impartial during the process, these are characteristics that also apply in litigation or arbitration where parties' lawyers or representatives must be given a chance to be heard, with the same amount of time and both parties receiving equal attention. These principle is beneficial to any party who participates in mediation and particularly for people in societies such as Samoa and the FSM who were not used to being given equal opportunities to be heard, the principle of the mediator being impartial provides them with an opportunity to be heard on views or ideas that they could never state; where disputes were resolved in the traditional setting. Therefore it is argued that they would be more appreciative of the process and also have more confidence in the system.

C The Mediation Models

1 Settlement model

Settlement is one of the four main models, which have been described as the models that form part of the first generation mediation practice.¹⁰¹ The other three models are facilitative, transformative and evaluative models.¹⁰² Settlement is positioned towards negotiation and bargaining and the mediator's role is to take the two separate positions of the parties as a starting point and allow them to bargain until they meet a central point where they can reach a comprise.¹⁰³ In this process, the mediator may use persuasive interventions but the mediator is limited as parties are expected to bargain for themselves.¹⁰⁴ This model is the most achievable and can be used in cases where the relationship is not the focus or where parties intend to terminate the relationship between parties.¹⁰⁵ This model is most suitable for contractual and commercial disputes.

2 Facilitative model

The facilitative mode is the most standard model in mediation¹⁰⁶and which most mediators and parties are more familiar with. Its main objective is to enable parties to find solutions to their underlying needs and interest rather than focusing on their positions and strict legal rights.¹⁰⁷ The role of the mediator in this model is to facilitate the process to encourage

¹⁰¹ Douglas, above n 88 at 22.

¹⁰² Spiller, above n 43 at 82.

¹⁰³ At 81.

¹⁰⁴ Boule, above n 9 at [36-37].

¹⁰⁵ Spiller, above n 43 at 81.

¹⁰⁶ Boule, above n 9 at [36-37].

¹⁰⁷ Douglas, above n 88 at 23.

dialogue and settlement by enhancing parties to negotiate by themselves and find solutions.¹⁰⁸ Parties are encouraged to form their own agenda, design their own agreements and make their own decisions.¹⁰⁹ This model places emphasis on distinguishing between the process and the outcome.¹¹⁰ It is also a good model to demonstrate and distinguish the principles of consensus, neutrality and impartiality. In this model the mediator is an expert in the mediation process.¹¹¹ This also doesn't necessary have knowledge of the subject of the dispute, which describes the principle of being neutral in the sense of disinterestedness. His or her main role is to conduct the process in an impartial manner with very little intervention¹¹² and enables the parties to use their own abilities to communicate with each other and voluntarily determine their outcomes.¹¹³

This model can be used for any type of dispute; in particular it can be used where there is an ongoing and professional or personal relationship between parties.¹¹⁴ The most common types of application are family, employment, environmental and organizational disputes.¹¹⁵ Alternatively, because of the mediator's low intervention in the process, parties may not find a solution to their dispute. The process can also be lengthy and parties may be unwilling to cooperate.¹¹⁶

3 Transformative model

The transformative model focuses on the changing relationship of parties apart from solving the dispute.¹¹⁷ Bush and Folger¹¹⁸ who developed the method argue that this model aims to achieve conflict transformation rather than conflict resolution and argues that parties have the desire and the ability to transform conflict.¹¹⁹ This model is about empowerment and recognition shifts where parties are encouraged to deliberate and make decisions.¹²⁰ The mediator's role is to use techniques and interventions to deal with the

¹⁰⁸ Boule, above n 9 at 37.

¹⁰⁹ Douglas, above n 88 at 23.

¹¹⁰ At 22.

¹¹¹ Boule, above n 9 at 36.

¹¹² Boule, above n 9 at 37.

¹¹³ Douglas, above n 88 at 23.

¹¹⁴ Spiller, above n 43 at 80.

¹¹⁵ Boule, above n 9 at 37.

¹¹⁶ Above.

¹¹⁷ Spiller, above n 43 at 82.

¹¹⁸ Douglas, above n 88 at 31.

¹¹⁹ At 31.

¹²⁰ Chern, above n 10 at 42.

underlying reasons that led to the dispute; to help parties reach new understandings about themselves and the matter on hand with a view of improving their relationship and allowing them to make their own decisions.¹²¹

Bush and Folger do not distinguish between process and content and rather maintain that they are both connected and cannot be separated from each other in practice.¹²² However, parties in this model are responsible for making the decisions on their own and the mediator's role is not to influence them in determining the outcome.¹²³ Parties' independence to make their own decisions has, however, been criticized. Given mediators' influence in the process and the content they can also influence the decision made by parties.¹²⁴ This model has also been criticized in regards to the parties bargaining power and the argument is that it is assumed that all parties have the ability and knowledge to reach fair and reasonable agreements and that the model does not take care of community standards of fairness and the issue of an imbalance in the power of bargaining.¹²⁵ Bolger and Folger¹²⁶ have argued instead that the mediator's role of 'empowerment' is independent of the substantive outcomes.¹²⁷ They argue that what is important in this model is for the mediator to achieve empowerment regardless of the outcome.¹²⁸ Despite this criticism, this model is appropriate for use in cases where not only the relationship issues are part of the dispute but where it is important to change the relationship so that parties have the ability to deal with other differences when they arise.¹²⁹ The areas it can be used in are community, family, workplace and matrimonial.¹³⁰

4 Evaluative model

The evaluative model is a model that evaluates the parties' dispute and directs the parties towards settlement.¹³¹ The mediator is an expert in the area of dispute and plays a quasi-arbitral role by forming a view of the legal merits of the substantive issues of the

¹²¹ Above

¹²² Douglas, above n 88 at 31.

¹²³ At [31 -32].

¹²⁴ Above.

¹²⁵ Above.

¹²⁶ Douglas, above n 88 at 32.

¹²⁷ At 32.

¹²⁸ Above.

¹²⁹ Spiller, above n 43 at 82.

¹³⁰ Boule, above n 9 at 37.

¹³¹ Chern, above n 10 at 35.

disputes.¹³² The main objective of this model is to reach settlement according to the parties' legal rights and entitlements should they have gone to court or their matter had been heard in a tribunal.¹³³ Out of all the models in mediation, the evaluative model is the most controversial in the mediation profession.¹³⁴ It was introduced only 40 years ago and traditionalist mediators, especially those who have been taught the facilitative model, criticize that true mediation is when the mediator encourages disputing parties to find a solution to their dispute without being coerced.¹³⁵ Chern¹³⁶ states that some writers take the view that adjudicatory procedures are used too often to make the decisions for the parties and there is no evidence that they were encouraged nor assisted to resolve their differences.¹³⁷ Another important argument is that the 'evaluative opinion starts to infringe on impartiality and the principle of consensus where parties are pressured into determining their outcome and which is not entirely voluntary.¹³⁸ Overall, the argument is that mediation is effective when the parties themselves determine the outcome themselves and not through outside influence.¹³⁹ Other disadvantages that have been identified in this process are that it blurs the distinction between mediation and arbitration, it does not teach parties skills for the future and adds more responsibilities for the mediator.¹⁴⁰

On the other hand, there are still some disputes that remain suitable to apply this model to; a commercial dispute is one such example.¹⁴¹ The mediator is chosen for his or her expertise, which saves time and money, the mediator can be brought up to speed more quickly because he or she already knows the industry, the commercial issues involved and the common commercial problems.¹⁴² Additionally, because a mediator has been chosen for his or her knowledge of the field, industry or the business that he is in, it is easier for the mediators to trust the mediator's ability and the mediator's opinion.¹⁴³ Other areas in which the model can be applied are in trade practices and relationship property.¹⁴⁴

¹³² Spiller, above n 40 at 84.

¹³³ Boule, above n 9 at 47.

¹³⁴ Chern, above n 10 at 35.

¹³⁵ [At 35-36]

¹³⁶ At 36.

¹³⁷ At 36

¹³⁸ At 36.

¹³⁹ At 36.

¹⁴⁰ Boule, above n 9 at 37.

¹⁴¹ Above.

¹⁴² Chern, n 10 at 35.

¹⁴³ Above.

¹⁴⁴ Boule, above n 9 at 37.

5 Summary

The above sections have described the main models in mediation and how the core features in mediation apply to each model. In the transformative and evaluation models, the mediator plays a very influential role compared to the settlement and the facilitative models. Also of significance, and what studies have shown in the mediation process, is that there is a tendency for mediators to shift from one model to another during the process. For example, during the settlement process where the mediator is asked to give an opinion and does provide that opinion this process changes to an evaluation model.¹⁴⁵ All four models have advantages and disadvantages and some models would be preferable to use for a particular type of dispute. Commercial disputes are recommended to use the settlement and evaluative model. Similarly, from studying the core features of mediation and in analysing a few of the traditional customs, particularly, from Samoa, FSM and PNG, the most suitable mediation model to resolve commercial disputes in the Pacific would be the evaluative model. This is because out of all the models it portrays the most similarities to the customs in Samoa, FSM and the X clan of Enga.

In these three societies although, the decision making process is of a consultative nature, the chiefs, matai or *kainakali* make the final decision. In the evaluative model, although the mediator is only to play an advisory role, in most cases from the evaluation made, parties will usually follow the mediator's decision. The Samoan, FSM and X culture show that they rely heavily on the opinion of the chief after they have discussed the matter. This too is similar to the evaluation model where parties rely heavily on the mediator for appropriate advice. In addition, for cross-border commercial disputes it would be beneficial for both parties to have a mediator who has the expertise and who would give them advice that could assist them to solve their dispute considering the complexity of the matter and the costs involved. It benefits parties to receive such advice so that they know what would be the most probable outcome and find a solution that they can both agree to. Should they have gone through litigation or arbitration they may spend the same amount of money or even more money and receive the same decision but with only one party coming out the winner. Despite only these two countries and one clan in PNG being used to make a comparison and recommendation on the appropriate model suitable for mediation in the Pacific. The argument is that the evaluative model is still the appropriate one for two

¹⁴⁵ Stipanowich, n 16 at 1206.

reasons. Firstly, because of its general principles, which can help to save time and costs if parties use it since parties would know what approach to settle the disputes. Secondly because it has been generally recommended as a suitable model for settling commercial disputes.

D Cross Cultural Mediation: The Difficulties

One of the fundamental characteristics in mediation which is vital for resolving disputes is effective communication.¹⁴⁶ The principal goal of a mediator in mediation is to facilitate the process that enhances parties to communicate and explore possible options in resolving the disputes.¹⁴⁷ One factor that can be quite challenging for a mediator is the cultural differences of the parties¹⁴⁸ which are likely to be experienced in cross-border disputes. Even more so today although, domestic disputes are increasingly likely to involve parties who represent different ethnic, racial, or national origins of cultures.¹⁴⁹ These cultural differences can become problematic if there are misunderstandings, or a lack of understanding which can cause a breakdown in negotiations.¹⁵⁰ Understanding how cultural differences may affect conflict resolution is important.¹⁵¹ These issues are particularly important to a mediator and how he/she uses their skills and techniques to overcome these barriers and enables parties to communicate effectively.¹⁵²

Culture is the term understood to mean race, ethnicity, class, national origin, habits, behaviour, beliefs, values and traditions learned or acquired by different social groups.¹⁵³ All cultures have processes for creating understanding and resolving troubles and while some may be common, others may not be.¹⁵⁴ For instance, the concept of mediation is not universally similar wherein western cultures' mediation is understood in contractual terms and is typically regulated under statute or by contract.¹⁵⁵ The focus is on individualistic

¹⁴⁶ Alexandra Alvarado Bowen "The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships" (2005) 60 (2) *Dispute Resolution Journal* 60.

¹⁴⁷ Above.

¹⁴⁸ Above.

¹⁴⁹ Strong, above n 14.

¹⁵⁰ Above.

¹⁵¹ Angela Cora Garcia "Mediation Talk in Cross Cultural Perspective: The Contribution of Conversation Analysis" (2013) 9(4) *China Media Research* 85.

¹⁵² Boule, above n 9 at 65.

¹⁵³ At 61.

¹⁵⁴ Garcia, above n 151.

¹⁵⁵ Boule, above n 9 at 62.

rights and interests with the aim to draw up an agreement that resolves the dispute.¹⁵⁶ In traditional societies mediation is less contractual and is more socially orientated with its main goal to bring back group harmony through reconciliation.¹⁵⁷ Even the communication styles from different cultures are different and the approach on how to resolve the conflict would be different.¹⁵⁸ In some cultures people communicate in a rational and linear way and others with more emotions focusing on their feelings. This is evident in mediation with the approaches from different cultures.¹⁵⁹ For instance in Western cultures people tend to be right focused, individualistic, adversarial and reliant on rational logic and documentation, Eastern cultures tend to be relational, collective, collaborative and reliant on trust, moral persuasion and social consensus.¹⁶⁰ In the Pacific, there is limited data on the different types of customary dispute resolution systems;¹⁶¹ the role of custom; and how custom affects communities. Most of the attention has been on their structures and who has the authority.¹⁶² There has also not been much research done on how the authority is used.¹⁶³ From studies that have been conducted it has been concluded that the main focus for solving disputes are to restore social harmony, where the bodies that are established to resolve disputes seek resolutions that all parties can agree to and that represent the collective interest of the community.¹⁶⁴ The processes have been participatory,¹⁶⁵ but those with power can manipulate the system and the rights of particular groups of people such as women and minority groups are ignored¹⁶⁶.

From the countries that have been used as examples so far, it is was found that people from the FSM are non-confrontational and are not familiar with the adversarial system of resolving disputes and that all three countries, Samoa, FSM and PNG had a consensus based approach of solving disputes. In Chapter IV, Samoa and the X and Y clans traditional decision making process will be studied in detail to determine how the middle man and the people participates in the process. Furthermore apart from the people in FSM who studies

¹⁵⁶ Above

¹⁵⁷ At 62.

¹⁵⁸ At 62.

¹⁵⁹ Above.

¹⁶⁰ At 63.

¹⁶¹ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012," above n 53 at 3.

¹⁶² Above 3.

¹⁶³ At 19

¹⁶⁴ At 20.

¹⁶⁵ Above.

¹⁶⁶ Above.

have shown are non-confrontational people¹⁶⁷. It is difficult to draw conclusions on how people from the Pacific communicate. What is however particularly important to note whether in the Pacific or outside the Pacific, is that there are people with different cultures and how people communicate would vary from culture to culture. Therefore mediators when dealing with people from different cultures, must be aware of these differences so that when difficulties arise he or she is conscious of it and can be able to address it.¹⁶⁸ Furthermore, there are also ways that the mediator can address these issues, such as discussing with parties in joint session or in caucus, or having co-mediators who have cultural similarities to the parties.¹⁶⁹ It has been critiqued, however, that experienced and knowledgeable mediators are able to overcome these differences in cultural backgrounds and therefore cultural differences in mediation is not very problematic¹⁷⁰.

E Summary

This chapter has set out the principles and models of mediation and has shown how the mediation practice is evolving in many different ways. The main reason for its development has been through an increase in use due to dissatisfaction of high costs, delays and procedural formalities associated with other processes such as arbitration and litigation.¹⁷¹ Other reasons for its development have been due to the role culture has played in the field and the different techniques that mediators use.¹⁷² The regulatory framework that has been developed to provide mediation in different jurisdictions has also contributed to its development.¹⁷³ In the Pacific, the main reason has been because of how it can help to save time, costs and improve the judiciary. Data available from a few Pacific Island Countries, particularly Samoa and FSM and PNG, indicate that there are some similarities in the customary dispute mechanisms and mediation processes practiced which may mean that people from these regions are amenable to the mediation process. However, what would be new process and what was seen particularly in Samoa and the X clan of Enga, was that these group of people are used to the decisions being made by the chiefs and not by the parties themselves. But in analysing the mediation models, it shows that mediators are

¹⁶⁷ Matthew Zurstrassen “Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 2: Federated States of Micronesia Country Report, “above n 53 at [9- 10]

¹⁶⁸ Bowen, above n 148 at 61.

¹⁶⁹ Bowen, above n 148 at 61.

¹⁷⁰ Strong, above n 14.

¹⁷¹ Above.

¹⁷² Stipanowich, above n 16 at 1200.

¹⁷³ Above.

trained and able to get parties to participate fully in the process. Additionally, the level of influence the mediator has to help parties varies from model to model and parties are at liberty to decide on the appropriate model they would like to apply. With regard to what model to use for commercial matters both domestically and internationally, the evaluative model appears to be the most appropriate. Finally, on the aspect of cultural differences, it is important for the mediator to be aware of these differences so that the mediation processes is effective for both parties and a resolution can be reached that both parties are satisfied with. Thus it is the author's view that because of the different types of models offered in mediation and how mediation is able to adapt to suit the circumstances of a particular case; and can deal with any type of cases; and has no strict legal requirements on how the process is conducted and can accommodate any culture, mediation will be a useful mode particularity for courts in the Pacific to reduce their backlogs.

III Mediation in the Pacific

A Overview

An inefficient judicial system and highly expensive and time consuming process in enforcing contracts are impediments to investment and trade.¹⁷⁴ The IFC and World Bank as part of a strategy to improve the business environment in the Pacific Region introduced mediation to resolve disputes which could take several years to resolve and which were quite costly.¹⁷⁵ According to the Doing Business Report 2007 under the standard litigation procedures to resolve a dispute, it took Vanuatu 30 procedures on average, 430 days and 56% of the cost of the claim.¹⁷⁶ In PNG in 2007 contract enforcement took on average 43 procedures, 591 days to resolve a dispute, at a cost of 110% of the claim amount, using standard litigation procedures.¹⁷⁷

The IFC and World Bank with support from their donor partners, Australia, New Zealand and Japan between 2008 and 2009 began implementing a mediation program in PNG, Samoa, the Solomon Islands, Vanuatu and Tonga.¹⁷⁸ The mediation program was court

¹⁷⁴ World Bank Group "Alternative Dispute Resolution Guidelines", above n 2 at V.

¹⁷⁴ Above.

¹⁷⁵ International Finance Corporation, above n 1.

¹⁷⁶ Doing Business "Doing Business, Measuring Business Regulations: Enforcing Contracts" < www.doingbusiness.org >.

¹⁷⁷ Above.

¹⁷⁸ Serge Devieux, Director for Financial Markets, IFC-Asia Pacific "Fostering Private Sector Development" (speech to IFM Pacific Conference, Apia, 23 March 2012 at 1.

annexed mediation. The IFC and World Bank in partnership with the Ministry for Justice and the Courts in these respective countries implemented the following program:¹⁷⁹

- a) Drafting new rules and legislation to support mediation;
- b) Recruiting and training new mediators;
- c) Helping court Registrars and other court staff to develop mediation case management processes and;
- d) Conduct awareness programs with business people, the media and the legal profession.

Through these programs, in Tonga 47 cases were mediated, in Vanuatu 46 cases and in PNG over 100 have been mediated.¹⁸⁰ There has also been very positive feedback from participants and lawyers from all countries where the program was introduced. Another positive aspect about using mediation in the region is that some Pacific societies are used to the idea of a consensus based approach to resolving disputes.¹⁸¹ These countries have become supportive of mediation as the mode to resolve business disputes.¹⁸² In PNG for instance, Justice Ambeng Kanadaski, at the Asia Pacific Mediation Conference in 2014, said:¹⁸³

PNG was a nation that was used only to resolving conflicts through consensus in the first place and only failing that tribal warfare. There were no police and armed forces to enforce a court order or prisoners to keep lawbreakers. The societies efficiently and effectively dealt with each problem that arose in society as they occurred...Given PNG's cultural background mediation is well suited to the PNG cultural traditions of reconciliation.

In addition, mediation would also have been welcomed in the region because of its characteristics. Mediation is an informal process, it is flexible, and has the ability to enable parties to produce more creative, satisfactory solutions and helps to maintain relationships.¹⁸⁴ In the Pacific where the populations are small, such as in Samoa,¹⁸⁵ there

¹⁷⁹International Finance Corporation, above n 1.

¹⁸⁰ Above.

¹⁸¹ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012," above n 53 at [5-8]; Kandakasi, above n 54 at [12-13].

¹⁸² Kandakasi above n 54 at 12; International Finance Corporation, above n 1.

¹⁸³ Kandaakasi, above n 54 at 12.

¹⁸⁴ Stipanowich, above n 16 at 1192.

¹⁸⁵ Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

are not many businesses and finding a creative solution and maintaining a business relationship with existing business partners are particularly important. The reason being not only because of the business prospects but having an estranged relationship with someone whom you keep running into on a daily basis would be very uncomfortable. Finally, mediation is well suited to the Pacific as it is a process that reflects culture; local mediators trained even to international standards while remaining familiar with their own culture could accommodate some of their culture into the process.¹⁸⁶ For instance in the FSM, the Traditional Dispute Resolution process involves;¹⁸⁷ a) family representation of an individual; b) use of respected elders as mediators; c) payment as restitution; and d) symbolic agreement between families to restore peace. Although, a mediator cannot accommodate all the traditional processes as they may conflict with the features in mediation and also subject to the provisions of the mediation rules of that respective country a mediator could at the end of a mediation session, allow for a symbolic gesture such as a meal that is cooked and shared by all which would symbolize the end of the dispute. Such a symbol would be acceptable in the FSM but perhaps not for a foreigner who hasn't lived in the FSM and is not familiar with the culture or has not been given advice about such practices by the mediator beforehand. He or she may find it uncomfortable and not want to partake in the meal, especially if the decision was not in his or her favour. However, such a custom would not have any influence on what was resolved or assist in resolving the dispute and therefore may not be necessary. Including such, a custom would portray that a country would like to accommodate its customs in the process. Subject to them not being in conflict with the rules of mediation in their country and both sides agreeing to such activities, it could be applied.

B Mediation in Legislation

Prior to the mediation program being introduced by the IFC and World Bank, mediation had already been recognised as an alternative to the court system to resolve disputes in the Pacific. There were government or non-government organisations, educational institutions and even legislation that provided for mediation to resolve different types of disputes.¹⁸⁸ In all five of these countries, the Courts had made provision for court-annexed mediation¹⁸⁹

¹⁸⁶ Kandakasi, above n 54, at 12.

¹⁸⁷ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 2: Federated States of Micronesia Country Report", above n 53 at 15.

¹⁸⁸ Hassall, above n 13 at [5-7]

¹⁸⁹ Vanuatu Civil Procedure Rules, pt 10, Solomon Island Courts (Civil Procedure Rules) 2007 ch 10, Alternative Dispute Resolution Act 2007 (Samoa) Part 111, Tonga Supreme Court Rules 2007 and Kandakasi n 54 at [12-13].

and IFC, World Bank and their donor parties through funding and the programs that had been established only reinforced this. In Vanuatu, the Civil Procedure Rules No 49 of 2002 provided under Part 10 for the referral of cases by judges to mediation, the staying of matters, pending outcome of mediation and the registration and the enforcement of mediated settlement orders as orders of the Court.¹⁹⁰ In PNG the ADR Listing Court had been created prior to the Rules relating to the Accreditation, Regulation, and Conduct of Mediators 2010.¹⁹¹

Furthermore, one particular area where mediation has had a great influence in the Pacific is with regard to settling land disputes. In the Pacific, economic development of customary land is one of its main challenges and in Vanuatu, the Solomon Islands and PNG it accounts for over 90% of all land in each of these countries.¹⁹² Samoa approximately has 81% customary land.¹⁹³ In IFC's report on the mediation program in the Pacific Islands, it has reported that land disputes are limiting business opportunities and mediation can help to free up land for economic development¹⁹⁴.

Two countries that place emphasis on mediation to resolve land disputes are in Samoa and PNG.¹⁹⁵ They both have legislation that provides for mediation/conciliation. However, what is also quite significant, in both these jurisdictions is that these countries also use their own traditional dispute settlement processes in settling these land disputes. In Samoa, the Land and Titles Amendment Bill 2010 under ss 3 and 7, provides that before the referring of a matter to the Land and Titles Court, the parties must attempt to undertake Samoan conciliation.¹⁹⁶ Samoan conciliation is defined as a process by which parties, 'with the assistance of the Registrar uses the Samoan customs and usages to identify the dispute, develop options, consider alternatives and endeavour to reach an agreement which accords with the Samoan customs and usages.'¹⁹⁷ Accordingly, the process in the Samoan Land and Titles Court involves a mediator, who is the Registrar and is a court staff member but who

¹⁹⁰ Hassall, above n 13 at 7.

¹⁹¹ Kandakasi, above n 54 at 12-13.

¹⁹² International Finance Corporation, above n 1.

¹⁹³ Don Patterson and Sure Farran *South Pacific Land Systems* (USP, Fiji 2013) at 239

¹⁹⁴ International Finance Corporation, above n 1.

¹⁹⁵ Patterson, above n 193 at 288 and R. W. James and L. Kalinoe "Resolving Customary Land Disputes Settlement" (2005) 2 MLJ 43 R. W.

¹⁹⁶ Jennifer Corrin and Don Patterson *Introduction to South Pacific Law* (3rd Ed, Palgrave Macmillan, Malaysia, 2011) at 288.

¹⁹⁷ Above.

is also a *matai*.¹⁹⁸ In the mediation process itself, the Registrar uses Samoan customary process for the introductory statements; providing parties with an opportunity to present their side of the story and respecting the status of parties.¹⁹⁹ It has, however, been said that the term “mediation in the context of the Land Titles Court is rather broad and covers anything from pre-trial meetings to explain parties rights to complex and prolonged mediation processes involving mediation.”²⁰⁰ The cases that go through this court are any disputes involving land such as chiefly titles over land, boundary issues and family disputes over land.

In PNG the Land Dispute Settlement Act 1975 (LDSA) under s11 provides for the appointment of land mediators from the locality where the dispute is in. Also under s15 it provides that the mediator “where it considers it appropriate, the mediator may seek the assistance of any customary dispute settlement authority that in his opinion has customary jurisdiction in relation to the dispute. The provisions of the Land Dispute Settlement Act 1975²⁰¹ for instance, would apply in a dispute involving land that was being used by an extractive resource company. Oil Search (PNG) Ltd from the oil and gas sector for instance, after failing to assist landowners to resolve a land dispute using their own community affairs division that provides mediation on disputed land claims, would assist the landowners to make an application under the Land Dispute Settlement Act.²⁰² In addition under the Oil and Gas Act 1998, it makes provision for land disputes to be settled under the Land Dispute Settlement Act 1975. Disputes in this sector usually arise if the former customary landowners are entitled to any benefits, such as royalties as a result of the extraction of the oil from a particular land area. Accordingly, the disputes would be over which group of landowners are actual owners of the land. Disputes have also arisen over ownership of the customary land prior to its acquisition by the State and it is now being leased to Companies such as Oil Search (PNG) Limited and therefore there are disputes as to which group is entitled to compensation.

If an application is made under the Oil and Gas Act 1998 by Oil Search (PNG) Limited, s121 allows provision for land mediators to be appointed under the Land Dispute

¹⁹⁸ Matthew Zurstrassen “Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 1: Samoa Country Report,” above n 53 at 17.

¹⁹⁹ Above.

²⁰⁰ Above.

²⁰¹ Matthew Allen and Rebecca Monson “Land and Conflict in Papua New Guinea: The Role of Land Mediation” (2014) 10 (2) Security Challenges 1 at page 5.

²⁰² At 8.

Settlement Act 1975 (LDSA) where it is necessary to determine the rightful customary owners of land, occupiers or those with interest in the land. Section 11 of the LDSA, provides for the process of appointing a land mediator. These are state sanctioned land mediators and are usually appointed according to his or her locality,²⁰³ because of their detailed knowledge of the customary land tenure systems of that area and also the customs and traditions. Most of these mediators are either Village Court Magistrates, Land Court Magistrates or state appointed mediators who have received some formal training of the basic mediation process. However, if the land mediator were from that locality, he or she could also utilize the customary dispute mechanisms of that area which would be more suited to the people. Furthermore he or she would be aware of the cultural behaviour of the disputing parties and thus be in a position to facilitate the process and avoid an impasse. If a mediator is either not from the locality or is not aware of the traditional processes for resolving disputes and would like assistance, s 15 provides for this avenue where the disputants themselves are actively involved in the process using their traditional dispute settlement processes and the land mediator is there only to assist.²⁰⁴

In analysing both the Land Titles and Courts Amendment Bill 2010 and the LDSA, it can be concluded that both Samoa and PNG have accommodated their customs and practices in the mediation process to suit their culture. The local mediators in PNG or in Samoa the Registrar are appointed to facilitate the process and parties are encouraged to resolve the dispute using their traditional processes that would have traditionally been used before colonialism and the court system. In Samoa even the Registrar is a *matai*. However, it has found that unless the *matai* has a high title in the village, this would not have any impact on how he facilitated the dispute and instead he would be seen only as a government official assisting to resolve the dispute.²⁰⁵ Furthermore studies have shown that although the Land and Titles Amendment Bill 2010 provides for all matters filed in the Land and Titles court to go through mediation, some parties of disputes have shown that this has not occurred.²⁰⁶ Because the term mediation is quite broad in the Land and Titles Amendment Act 2010, mediation can cover a wide range of processes conducted by the Registrar, such as in a family dispute where previously there was a decision on the subject case, the Registrar

²⁰³ At 5.

²⁰⁴ R. W. James and L. Kalinoe “Resolving Customary Land Disputes Settlement” (2005) 2 MLJ 43 R. W. James and L. Kalinoe “Resolving Customary Land Disputes Settlement” (2005) 2 MLJ 43 at 47.

²⁰⁵ Matthew Zurstrassen “Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 1: Samoa Country Report” above n 53 at 17.

²⁰⁶ At 16.

would explain the decision to them rather than conduct the mediation process.²⁰⁷ This is so that parties can then understand the decision and assess whether they have a case to pursue. In PNG, studies revealed that land mediators and village court magistrates were abusing powers under the Land Dispute Settlement Act 1975 and Village Court 1989.²⁰⁸ In PNG, the Alternative Dispute Resolution Centre is currently considering whether all local mediators should be accredited under the ADR Rules,²⁰⁹ which could assist to control this abuse. Samoa perhaps too should consider this approach, which could also assist in improving the mediation process under the Land and Titles Court.

C Recognition of Custom in Legislation

In the Pacific, where studies have been conducted, the customary dispute resolution process still plays a very influential role for many.²¹⁰ What has also been significant in the region in some of these jurisdictions as well is the recognition of custom to resolve disputes through legislation. This is evident from the Samoa Land Titles and Courts Amendment Bill 2010 and the Land Dispute Settlement Act 1975 in PNG. Studies have also shown that although custom plays an influential role for many countries in the region, their structure, relationship and influence with formal systems varies considerably.²¹¹ For instance in Melanesian societies, it has been reported that there is great diversity in ‘customs’ and ‘customary laws’ such as in Vanuatu and the Solomon Islands.²¹² Customs vary between the communities; even on the same island. On the other hand in Micronesian and Polynesian societies customs are quite similar. For example, in Tonga and Samoa many of the customs are uniform.²¹³

²⁰⁷ Above.

²⁰⁸ Michael L. Murphy “Bilums on the Battle Axe: Commercial Mediation Amidst Litigation in PNG: A Comparative Study Of Court-Annexed Mediation In Papua New Guinea” (paper prepared for The International Finance Corporation (Ifc).

²⁰⁹ At 1.

²¹⁰ Matthew Zurstrassen “Final Report to the Regional Pjdp Meetings in Samoa in March 2012,” above n 53 at 2.

²¹¹ Above.

²¹² Corrin, above n 200 at 40.

²¹³ Above.

The Oxford Dictionary of Current English defines ‘custom’ as the usual way of behaving or acting; established usage as a power having a source of law.²¹⁴ Corrin²¹⁵ explains that the dictionary meaning of custom is twofold in nature, firstly custom can merely be a custom or a usage, which means what, is actually done by people and secondly, it can also be a practice or a usage that is required to be done. When people say this is the custom, they mean this is the norm. Hoebel states:²¹⁶

Norm, in its statistical sense, is a strictly neutral term. It merely expresses what is, on the basis of a numerical count. It says nothing of what ought to be or what people think ought to be. It is a quantitative concept.

There are many definitions provided for the term custom or customary law however, most countries in the region do not define the term custom or customary law.²¹⁷ There are some countries that have provided for the definitions of custom in legislation. For instance in Kiribati under the Laws of Kiribati Act 1989 s5(1) and the Laws of Tuvalu Act 1987s5(1) they have similar definitions and define customary law as ‘the customs and usages existing from time to time of the natives of Kiribati [or Tuvalu]’.²¹⁸ In PNG, the Constitution²¹⁹ defines custom as:

The customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises; regardless of whether or not the custom or usage has existed form immemorial.

Therefore it can be inferred that custom means the practice of a certain group of people within a certain period of time. In the region, there are two main areas where custom has had a great influence: land issues and maintaining social order.²²⁰ All countries in the region, except Tonga, have recognized custom or customary law in legislation by making express provision for the application of custom or customary law by courts or tribunals

²¹⁴ Oxford Dictionary of Current English (OUP, Oxford, 1984) at 179.

²¹⁵ Corrin, above n 200 at 40.

²¹⁶ Adamson Hoebel *The Law of Primitive Man* (Harvard University Press, Cambridge Massachusetts, 1954) at 20.

²¹⁷ Corrin, above n 196, at 4.

²¹⁸ Above.

²¹⁹ Constitution of Papua New Guinea 1975(PNG) sch1.2.2(1)

²²⁰ Matthew Zurstrassen “Final Report to the Regional Pjdp Meetings in Samoa in March 2012,” above n 53 at 3

authorized to determine rights to customary land.²²¹ There are also other matters that countries make provisions to apply custom or customary law and which vary from country to country. The most common matters that are made provision for other than land relate to marriage and adoption of children. Additionally, most countries in the Pacific have a constitutional provision or statute that provides how to determine a custom and whether it is enforceable.²²² For example, PNG, Fiji, the Marshall Islands, Vanuatu and the Solomon Islands all have Constitutional provisions directing Parliament in a form of an instruction to legislate for the application of customary law.²²³ In addition, in PNG, Tuvalu, Kiribati and the Solomon Islands there has been legislation that provides for general instructions for the courts on how to recognize for the application of customary law.²²⁴ In other countries in the Pacific, such as Niue or Nauru there is brief legislation on point²²⁵ and in other countries there are statutes such as an Evidence Act or Court rules with a provision on how to prove custom or customary law.²²⁶ It is, has been stated and should be acknowledged that although there has been express provision in written law for the application of customs or customary laws, in the region custom will in practice continue to be applied by customary chiefs as a means to have social control over members of their communities subject to them being prohibited by law.²²⁷

D Summary

Countries in the Pacific have already recognised mediation as an important mode to resolve disputes prior to the court annexed program that had been introduced by IFC and the World Bank. The court-annexed mediation program, however, greatly assisted countries where there were short falls such as in training mediators, funding to support the courts to establish effective mediation centres and providing technical experts to assist, review, amend and draft legislation for mediation²²⁸. All countries have had a few success stories since the program was introduced and it is inevitable that mediation will continue to grow in the Region. Furthermore what has also been important is the recognition of their customary practices in legislation to coordinate the mediation process. This has been

²²¹ Corrin, above n 196 at 41.

²²² Jean G Zorn and Jennifer Corrin Care *Proving Customary Law in the Common Law Courts of South Pacific* (British Institute of International and Comparative Law, London, 2002) at 5.

²²³ Above.

²²⁴ Above.

²²⁵ Above.

²²⁶ Zorn, above n 222 at 5.

²²⁷ Corrin, above n 196 at 60.

²²⁸ International Finance Corporation, above n 1.

evident in both Samoa and PNG. Both countries, although adopting the mediation practice into their countries, have adopted their customs and traditions into the practice so that it is suitable for their culture. This is one positive aspect about mediation, because of its principles of flexibility, it is informal and adaptable to any culture. Thus it can be applied to suit any circumstances. PNG and Samoa have adapted the mediation process to make it culturally fitting to their societies. The Land Titles and Court Amendment Act and Land Dispute Settlement Act are examples of such legislation incorporating custom which have successfully been adopted to assist people in resolving their disputes. Due to their familiarity with their own customary processes, they may be able to communicate or participate more effectively in the adopted mediation process. There have however, been some difficulties experienced in both countries in facilitating the process where in PNG there have been recommendations made on how to strengthen these systems.²²⁹ Nevertheless, these two countries demonstrate that countries in the Pacific who do recognise custom and customary law in their legislation could also make provision for mediation in legislation and adopt their customs into the process to help resolve any type of dispute aside from land disputes. From the data provided it can be clearly seen that mediation is helping to resolve all types of disputes and that it has the potential to improve the regulatory and business environment in the region.

IV Case Studies in the Pacific: Samoa and Papua New Guinea

The Mediation Program: Successes and Failures

Through the mediation program and with the assistance of IFC,²³⁰ PNG launched the Rules relating to the Accreditation, Regulation and Conduct of Mediators in 2010 (ADR Rules).²³¹ In Samoa, the Alternative Dispute Resolution Act 2007 was reviewed and amended and the Alternative Dispute Resolution Amendment Act 2013 and the Mediation Rules were launched.²³² In PNG, from June 2011 until June 2013, the Alternative Dispute Resolution Centre (ADR Centre), which administers mediation in PNG has administered 157 cases ordered for mediation,²³³ 84 (54%) of those matters were partially or fully settled

²²⁹ Murphy “Cross Pollinating Conflict Resolution”, above n 55 at 1.

²³⁰ International Finance Corporation, above n 1.

²³¹ Murphy “Bilums on the Battle Axe” above n 208 at [3-4].

²³² Lagi Keresoma “Mediation as an option to resolving disputes” *Talamua, Talamua On-Line News Service*, Apia, 27th August 2007).

²³³ Murphy “Bilums on the Battle Axe,” above n 208 at 1.

and 73 (46%) ended without settlement.²³⁴ In total 64 (41%) were fully settled and reduced the number of legal claims for 20 (13%) of the cases.²³⁵ For Samoa, accurate data was not provided on how many cases have gone through the process of mediation since the amendment to the ADR Act 2007, however, it has been stated that out of all cases that had gone through the process approximately 70-75% were successful.²³⁶ It should be noted that in both countries there was no data provided on the type of cases that went through the mediation process and what were the percentages of the cases of the different types of disputes and how many were successful or not.

In regards to the perception of lawyers and disputants about the mediation program being introduced in both countries. Initially lawyers were not too enthusiastic about having to participate in the mediation program.²³⁷ They saw mediation as a threat to their profession.²³⁸ In PNG, lawyers have also stated that they did not like being forced to mediate. The lawyers argued that judges, without intimate knowledge of their cases, were referring them to mediation. Secondly, they stated that by forcing unwilling parties to mediate, judges were creating additional costs and procedural hurdles before trial.²³⁹ Nevertheless, from the case studies conducted in PNG, reported that, generally after lawyers had participated through the process, they agreed that mediation was a good process.²⁴⁰ There have been three significant aspects about the process that the courts do not offer and have been identified from the lawyers who were interviewed in the case studies conducted in PNG. Lawyers identified, firstly mediation gave them the opportunity to prepare for trial as lawyers were able to study the other parties' cases and refine their own arguments accordingly;²⁴¹ secondly mediation helped to isolate and resolve conflicts that would have been bound together if addressed in court; and thirdly,²⁴² the mediation process provided a structured forum in which parties can liaise and address their conflict.²⁴³

²³⁴ Above.

²³⁵ Above.

²³⁶ Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

²³⁷ Murphy, above n 212 at 25; Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

²³⁸ Above.

²³⁹ Murphy "Bilums on the Battle Axe," above n 208 at 25.

²⁴⁰ Above.

²⁴¹ At 26.

²⁴² Above.

²⁴³ Above.

Overall most lawyers agreed that mediation helped to improve a working relationship between parties.²⁴⁴

In Samoa the program has been running for three years compared to PNG, which has been for about five years. Lawyers in Samoa after participating in the process do agree that mediation is a good forum to resolve disputes, however they still see it as a threat to their profession.²⁴⁵ Disputing parties have also agreed in Samoa that mediation is a good mode to settle disputes. In PNG, from the case studies conducted, there are many reasons why disputants have been satisfied with the mediation process, but the four main reasons are: firstly, they have confidence that the outcome will be recognized by the courts and be enforceable since they have been referred to mediation by the courts.²⁴⁶ Secondly, they prefer the remedy offered by mediation rather than a legal remedy, for instance receiving an apology from one of the disputing parties.²⁴⁷ Thirdly parties are able to engage in the conflict and address the issues rather than being bystanders and the lawyers facilitating the process in court²⁴⁸ and finally going to court is a costly and timely process which can take a long time to obtain a judgment.²⁴⁹

The above are the perceptions of lawyers and disputants about the positive aspects of the program, including the data provided on percentage of how many cases have been successful in both Samoa and PNG. In Samoa, however, the estimations made might not be entirely accurate.²⁵⁰

There are also some failures that have also been experienced in the program which were identified in PNG, by the data provided. Six conditions were identified that have prevented mediation from being successful.²⁵¹ Firstly, mediation is likely to succeed if at least one of the parties wants to mediate and respects the process.²⁵² It has been suggested from the data provided by PNG, that out of the 157 cases 64% were fully settled and this is because

²⁴⁴ Above.

²⁴⁵ Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

²⁴⁶ Murphy Bilums on the Battle Axe, above n 208 at [26-27].

²⁴⁷ Above.

²⁴⁸ At 27.

²⁴⁹ At 26.

²⁵⁰ This was an estimation made by Maiava Visekota Peteru, President of the Accredited Mediators Association in an Interview conducted with the author on 23rd of December 2015.

²⁵¹ Murphy "Bilums on the Battle Axe", above n 208 at [29-30].

²⁵² At 29.

of one of the parties willing to settle;²⁵³ secondly mediation is likely to succeed if participants invest in time resolving, are persistent, and are patient in the process. For instance, in one of the case studies which was a Property Development Dispute between a Developer and former customary landowners of the land in dispute.²⁵⁴ The mediation was successful because all parties, including the mediator, performed beyond their scope of duties, the lawyers on both sides educated the landowners about legal entities and obtaining titles, the mediators collaborated with the parties to draft the dispute and mediation was held for more than one day.²⁵⁵ It was reported,²⁵⁶ that because of parties' willingness to participate in the process and all parties, including the mediator assisting parties to find a solution the process worked. If participants had not participated fully, for example like the lawyers on both sides educating the landowners, they would not have come up with an agreement. Thirdly, mediation is likely to succeed if disputants have authority and there have been some instances that mediation has failed because one of the parties did not have authority.²⁵⁷ Fourthly, agreements that do not rest on a 3rd party to act will succeed; for instance, if an agreement rests on a Board's vote.²⁵⁸ Fifthly, if the agreement is reduced to writing before the mediator signs the Mediator's Certificate. The Mediator's Certificate, known as Form 2 in the ADR Rules,²⁵⁹ enables parties to enforce an agreement if it has been signed. In one of the case studies because one of the parties didn't have the authority to settle, parties did not draft and sign an agreement. Thus the mediator did not sign a Mediator's Certificate and therefore parties could not pursue enforcement of what was verbally agreed by the representative.²⁶⁰ Finally, depending on the type of disputes, there can be successful outcomes. For matters where the outcome depends on a legal determination, these have not been successful.²⁶¹ In regards to commercial contract disputes where the outcome relies heavily on the application and interpretation of the facts, there have been successful outcomes.²⁶² Other disputes that have been successful are family disputes, disputes that centre on damages and landowner disputes.²⁶³

²⁵³ Above.

²⁵⁴ At [13 -14].

²⁵⁵ At 29.

²⁵⁶ At 29.

²⁵⁷ At 29.

²⁵⁸ At [29- 30].

²⁵⁹ At 30.

²⁶⁰ At [10-11].

²⁶¹ At 30.

²⁶² At 30.

²⁶³ At 30.

The data provided above even though it is only been from PNG, has helped to identify some difficulties experienced by participants in the process and also the benefits. The Property Development case study has also demonstrated how the mediation process is flexible and how the participants including the mediator have utilized the process to reach an outcome. Furthermore, it is interesting to note that despite some failures of the programs, commercial contract disputes, particularly with matters that involve the application and interpretation of the facts have been recognised as a dispute that can be resolved using the mediation process in PNG.

A The Mediation Rules of Samoa and Papua New Guinea

The Mediation program coordinated in Samoa and PNG, although coordinated by the same organization; the program was implemented to suit the needs of the particular countries. This is particularly evident in the Mediation Rules drafted in both countries. An expert²⁶⁴ was provided in each country and in collaboration with people from, the respective Mediation or Alternative Dispute Resolution Teams the Rules were drafted. For PNG the ADR rules²⁶⁵ provided for all the procedural guidelines on mediation,²⁶⁶ such as what the mediator is to advise parties on regarding the process, duties and responsibilities of the mediators and it also makes provision for the mediator to consider matters such as impartiality, neutrality and confidentiality when conducting the process. Furthermore, the Rules provide for the accrediting of mediators and the Accreditation Council and handling of complaints, amongst other matters. In the Samoa Mediation rules on the other hand, although it provides for the accreditation of mediators, the Accreditation Board, handling of complaints. It does not provide for procedural guidelines for the mediator such as the ADR rules. Accordingly, the author inferred after studying the rules that because the Mediation rules of Samoa are not as detailed as the PNG Mediation rules, it provided mediators with the flexibility to conduct the mediation process according to what they thought would suit their clients, applying any of the four main models or other models that they thought were appropriate to facilitate the process. However, from an interview conducted with the President of the Accredited Mediators Association of Samoa,²⁶⁷ she

²⁶⁴ Murphy, above n 208 at 3 and Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

²⁶⁵ The Rules relating to the Accreditation, Regulation and Conduct of Mediators in 2010, although it provides for the definition of arbitration, the entire rules covers only the mediation process.

²⁶⁶ Murphy "Cross Pollinating Conflict Resolution", above n 55 at 34.

²⁶⁷ Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

advised that all mediators trained under the court annexed mediation program had been thought the facilitative model and were to follow the set processes in that model. She, however, stated she was of the view that the Mediation rules should have incorporated procedural guidelines similar to PNG to ensure mediators followed the process. Furthermore she stated that she was of the view the guidelines should be incorporated because of what happened in November 2015 in Samoa. One mediator completed the full mediation process in 45 minutes, which seemed unrealistic especially when in practice it takes approximately 45 minutes to explain the mediation process in the introductory stage even before beginning the program.

With regard to dealing with cross border disputes, there was no data provided on the number of cross border disputes that had gone through the process. But from one case study provided,²⁶⁸ between two Samoan companies involving a contractual dispute, where one of the Company Directors was a New Zealand Resident and the other originally from New Zealand but now a Samoan citizen and had lived in Samoa for a long time. The cultural differences were evident, in that the New Zealand Resident, after settling the matter, didn't want to shake the other party's hand.²⁶⁹ Whereas the Samoan citizen particularly wanted to maintain the relationship considering that they both worked in Samoa and that is was very likely, since Apia was a small town that they would bump into each other again²⁷⁰. It was reported that for the New Zealand Resident, he just wanted to settle the matter and was not worried about the future relationship of the parties whereas the Samoan citizen, having lived in Samoa for a long time, had adapted to the local culture and wanted to shake his hand after the matter was settled.²⁷¹ The New Zealand resident, although, they settled the matter still showed he was aggrieved about the matter, and didn't shake hands.²⁷²

In regards to PNG, most of the data provided did not identify whether the Company's participated were foreign or local companies,²⁷³ however one case was used to demonstrate the benefits of mediation and had helped to improve the relationship between a foreigner and a number of Papua New Guineans. The example is an Oil Palm dispute between an Oil

²⁶⁸ Above.

²⁶⁹ Above.

²⁷⁰ Above.

²⁷¹ Above.

²⁷² Above.

²⁷³ The author was advised that to protect the interest of the stakeholders, not all relevant details were revealed in the report. The report prepared for IFC is titled "Bilums on the Battle Axe: Commercial Mediation Amidst Litigation in PNG: A Comparative Study Of Court-Annexed Mediation In Papua New Guinea" and was prepared by Michael Murphy, a short term consultant.

Palm Company²⁷⁴ enacted by an Act of Parliament in PNG and the former customary landowners of the land where the Company runs its business including the land surrounding the mill.²⁷⁵ Because of environmental pollution in the sea, caused by the Company, it had resulted in the marine life being destroyed and some community members died as a result.²⁷⁶ Consequently, there were protests, sometimes involving violence made towards the Company, which threatened the operations of the Company.²⁷⁷ Thus the dispute led to three separate court cases and then resulted in mediation.²⁷⁸

The mediation was conducted in a place where 30 landowners were present to witness the mediation process, even though they had their representatives to participate.²⁷⁹ The representatives consulted the landowners before making decisions or to provide them with options.²⁸⁰ Negotiations lasted two days and a night where the agreement was agreed in principle because it required the Company's board to consent to the agreement.²⁸¹ In this dispute, the General Manager who represented the Company was an expatriate and whom the lawyer of the company said:²⁸²

[The GM, an ex-pat,] is the adversary's representative, yet he lives [with the community] every day. Mediation provides him with a semi-formal occasion to explain himself, the good he is trying to do, dispel rumors. The conversation is defined, it will not go on and on, every other day, and it is one he can refer to in the future with a measure of accountability.

What the Company's lawyer stated here is quite important because it shows how mediation provided the avenue for the General Manager to communicate. It demonstrates how mediation is flexible where more than 30 people were present to participate in the process and how because it is an informal process, the General Manager was able to communicate with all participants. It provided the landowners with an opportunity to see that the General Manager, who was also a foreigner, really cared for the people as he participated in the

²⁷⁴ This was the only Company that had been identified providing details of how it was established from all the five case studies provided in the report.

²⁷⁵ Murphy "Bilums on the Battle Axe," above n 208 at [7 and 8].

²⁷⁶ At 8.

²⁷⁷ Above.

²⁷⁸ At 8 and 9.

²⁷⁹ Above.

²⁸⁰ At 9.

²⁸¹ At 9.

²⁸² At 10.

process and showed how he felt about the matter when stating his views which these landowners were able to witness. This could never happen in court, even during cross examination, because firstly the lawyers were representing their client and secondly the lawyers would be focusing on seeking an appropriate relief for their client rather than concerned about the future relationship between the General Manager and the landowners who would be living on site.

Therefore, although, both the Samoan and PNG case studies were not international commercial disputes, it does demonstrate how mediation can be used in any culture and how it can help parties to improve, strengthen or create long-lasting relationships irrespective of the type of dispute. More importantly, if parties participate meaningfully and the mediator is skilled enough to assist parties to communicate effectively, then the process can work. Unfortunately, in the Oil Palm Dispute because the General Manager did not have authority to sign the agreement and agreed only in principle.²⁸³ The terms parties agreed upon were unenforceable because they were not reduced to writing which is a requirement under sub-r 12 (1) of the ADR Rules²⁸⁴.

B Recognition of Custom in the Mediation Rules

1 The traditional dispute resolution processes

The use of custom or customary laws by the citizens is recognised in both the PNG and the Samoa.²⁸⁵ In both countries they have traditional methods of solving disputes. In Samoa the customs are almost uniform²⁸⁶ compared to PNG where the customs vary,²⁸⁷ Accordingly, below will describe the Matai system, which is the traditional process of solving disputes in Samoa and from PNG because of the diversity in customs, two case studies will be provided. The X clan of Enga and the Y clan of Madang Province.

In Samoa, conflicts involving disputes between two different families within the same village are regarded as threatening the order of the village and thus a higher authority is

²⁸³ At 10.

²⁸⁴ At 10 and 11

²⁸⁵ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, above n 53 at 27 and 28

²⁸⁶ Corrin, above n 196 at 40.

²⁸⁷ Above.

required to intervene; manage the dispute; and resolve these matters²⁸⁸ This involves the village council who are represented by the matai (chiefs) and who have the authority to make decisions on behalf of the community.²⁸⁹ All families in a village are represented by a matai, in principle, the matai are supposed to bring all matters of community members for consideration.²⁹⁰ These decision-making processes have developed over many years and their main functions have been to maintain peace and social harmony in the village.²⁹¹ The decision making process under the Village Council has always been a transparent process particularly because the decisions the matai make are on behalf of the family and the community it represents. It should be noted that in Samoa, the State has recognised the significant role the village council plays and has made provision for the Village Fono Act 1990 under legislation to make rules relating to hygiene and economic development in accordance with custom and usages. The Act also provides the Village with power to punish village members who fail to follow the instructions of the Village Council.

Because customs in PNG vary, it would be difficult to assert only one set process that Papua New Guineans use to resolve disputes. Therefore, to assist comparing the customary processes of PNG with the mediation process to reveal their similarities, a few cases studies are required. A study was conducted in 2013 on the potential role that indigenous dispute resolution peacemakers play within PNG's communities and formal forums; three case studies were included.²⁹² Two of the three case studies are discussed below.

In X clan of the Enga Province in PNG, a middleman, a *kainakali* was requested by disputants to resolve the conflict.²⁹³ The *kainakali* came from a neutral clan and was appointed because he had the necessary skills and interest to maintain peace, which, if not contained, could lead to warfare.²⁹⁴ The *kainakali* met each party separately first before all parties met together.²⁹⁵ This method was applied to create the impression that it was the *kainakali* who was trying to make peace and that parties were still ready to go to war and not be seen as weak. Throughout the process, the *kainakali* had to be as neutral as possible

²⁸⁸ Cluny Macpherson, La'avasa Macpherson "The Nature and Limits of Traditional Dispute Resolution in Contemporary Samoa" (2006) 29 Pacific Studies 128 at [140-142]

²⁸⁹ Matthew Zurstrassen "Final Report to the Regional Pjdp Meetings in Samoa in March 2012, Annexure 1: Samoa Country Report" above n 53 at 9.

²⁹⁰ Above.

²⁹¹ At [9 and 12]

²⁹² Murphy "Cross Pollinating Conflict Resolution", above n 56 at 1.

²⁹³ At 19.

²⁹⁴ At 19.

²⁹⁵ At 19.

and was not allowed to show any form of bias.²⁹⁶ Today magistrates from the village court act as *kainakali* and are from outside the conflicting clans or other regions.²⁹⁷ During the process the *kainakali* was prohibited from disclosing information shared by a party with another and when voting the magistrate vote needed to be kept confidential.²⁹⁸ After all the consultation, the *kainakali* would provide advice and decide on the best solution for both parties.²⁹⁹

In another part of the country, in the Y clan of Madang,³⁰⁰ community leaders (headmen) were appointed as the middlemen and facilitated the process through caucusing.³⁰¹ These men were chosen because they were honest, discreet and had the necessary skill to help parties.³⁰² There were two headmen chosen.³⁰³ If the dispute involved two different villages then at least one would be represented from each side.³⁰⁴ Disputes within the village also involved two men from that same village³⁰⁵. The headmen were requested to facilitate the process or to intervene when they hear about the dispute given that the headmen are from the same community as the parties.³⁰⁶ They would also intervene to avoid violence³⁰⁷. In this process, parties never meet until the middlemen have facilitated the process, going back and forth with offers and counter offers until negotiations are finalized.³⁰⁸ This method of resolving disputes is a strategy to avoid violence and heated arguments if parties tried to resolve the dispute face to face.³⁰⁹ Once things are finalised, parties meet for reconciliation, where they make their statements, admit their faults and apologize. The disputes in this process are held in private unless the matter is serious and affects the community, then they are addressed in a public forum, to be addressed by church leaders or referred to Court.³¹⁰ The Y clan like to keep their matters as private as possible and therefore caucusing was a strategy used to avoid confrontation and heated arguments.

²⁹⁶ At 19.

²⁹⁷ At 19.

²⁹⁸ At 20.

²⁹⁹ At 20.

³⁰⁰ At 27.

³⁰¹ At 26.

³⁰² At 27.

³⁰³ At 27.

³⁰⁴ At 27.

³⁰⁵ At 27.

³⁰⁶ At 27.

³⁰⁷ At 27.

³⁰⁸ At 27.

³⁰⁹ At 27.

³¹⁰ At 27.

Furthermore, it is critical for the middleman to keep things confidential throughout the process and they are not permitted to disclose to the either side unless advised to do so.³¹¹ In this process, however, it was noted that the middleman had influence over the statements made by both parties as he reframed statements to assist with the negotiation process when communicating with the other side.³¹² The types of disputes that were dealt with in this process were from minor thefts to murder.

The three case studies described above have shown how traditionally people in Samoa and in parts of PNG have solved their disputes and which are still being used today. However, in all case studies, there have been the influence of modern forms of resolving disputes, where for instance in the Y clan, if they could not resolve a dispute it was referred to the church or courts. It is therefore inferred that these institutions such as church and the courts have had a great influence over the customary process of resolving disputes of the Y clan of Madang and therefore when being interviewed about their traditional process of resolving disputes, the churches and courts were referred to if they couldn't resolve a dispute. In the X clan, Magistrates are now also invited to solve disputes. With respect to Samoa, legislation has been passed recognizing the village council and also restricting their powers on what they can address.

In all three case studies, it is noted that, the disputes were resolved to maintain social order and harmony. In X clan, the disputes were resolved to avoid warfare and in Y clan to avoid violence. Additionally, in all processes from all three case studies, it shows that they have similar characteristics to mediation; however, the X clan and the Matai system in Samoa are more adjudicative with the *kainakali* or chief making the final decision compared to the Y clan. In comparing these traditional processes with the mediation models, the Y clan is very similar to the transformative model where the headman tries his best to get parties to sort out their issues, although this is not done face to face. But the Y clan process is different in the aspect of the headman reframing statements where in the transformative model the mediator uses techniques and interventions that encourage them to discuss their issues. The mediator in the transformative model does not provide advice and reframe statements. By contrast, the X clan and the Matai system are more similar to the evaluative model, where the chief and the Matai provide advice, which the mediator also does. The main difference however is that in the evaluative model, although the advice of the mediator can influence a party's decision, the outcome must be determined by the parties.

³¹¹ At 28.

³¹² At 28.

2 *The application of custom in the mediation rules of Samoa and Papua New Guinea*

In the Samoa Mediation Rules, Samoa has not made provision for the use of custom in the mediation process and only makes provision for the traditional language to be used and facilitated in Samoan as well.³¹³ On the other hand in PNG the ADR Rules have made provision for the application of customary processes in the facilitating mediation process. This inclusion of customary processes in the rules and the recognition of custom was done mainly because of the large number of land disputes that occurred throughout the country and which had great influence in affecting business, particularly in the resource sector industry³¹⁴ Recognising custom in the rules could assist to resolve disputes with landowners where the majority still practice their customs³¹⁵. Furthermore because the principles of mediation are flexible and informal, mediations could be conducted in the villages where the majority of these landowners are and which enables them to participate and helps to finalise a dispute that in courts could take years to resolve.

Accordingly, there are a number of provisions that provide for the application of custom. However, these provisions are not mandatory and can be applied only should parties agree or require them to. For instance, sub- r 56(1) provides for the mediators to be impartial and avoid conflicts of interest. However by custom pursuant to sub-r 56(2) a mediator who knows either of the parties, through relation, work or are friends could conduct the mediation process, if requested or recommended to. This is subject to sub-r 56(4) where the mediator can withdraw from the case or disqualify himself.

From the above case studies in PNG, it shows that the people from X clan prefer to appoint a person from a neutral clan or outside the region and in model Y a headman who is from that same clan is appointed to resolve the dispute or volunteers to help resolve the dispute. Applying the ADR Rules, if there was a land dispute in the Y clan area and a mediator was from that same area, and may be related to some of the parties of the dispute, parties may request for him to conduct the process because in their custom they allowed people from the same area where the dispute arose to assist with resolution. This is subject to all disputants agreeing as the other disputants may be from another part of the country. This provision appears more suitable for land disputes.

³¹³ Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

³¹⁴ Interview with Andrew Kwimberi, Lawyer and PNG Accredited Mediator, (Sheila Sukwianomb, Telephone Conference, 7th February 2016).

³¹⁵ Above.

A second provision that provides for custom to be applied is in section 46 of the Rules. It provides for the maintaining of professional integrity and states that the mediator under sub-r 46 (1) shall not provide any advice, opinion or evaluation on a matter in dispute; attempt to impose a decision on parties or knowingly assist or induce parties towards a decision. Sub rule 46(3), however, provides that a mediator is allowed to provide advice or opinions where he is partaking in a blended form, or a customary form, of mediation. Furthermore sub- r 46(3) provides that, a mediator is only allowed to provide advice or an opinion, if the mediator is an expert; has been requested to provide advice; is within his qualification; and does not 'interpret law,' 'statement' or a 'behaviour.' The mediation model that makes provision for this and is similar to sub-r 46 is the evaluative model where that model allows the mediator to provide advice. However, sub-r 46(3) does not allow the mediator to interpret the law which in the evaluative model makes provision for. Apart from the evaluative model, all other mediation models also do not authorise a mediator to provide advice, but as discussed in Chapter 11, there have been instances where the mediator has provided advice or has been requested to provide advice to parties and thus all these models may be applicable subject to the mediator not making any interpretations in law. For commercial disputes these provisions would be applicable although the mediator could not make interpretations in law, he is still able to assist parties with their cases.

Unfortunately, there has not been any data provided as to how effective these provisions have been in helping parties resolve disputes particularly between customary landowners. However, applying the Oil Palm dispute that was between the Oil Palm Company and the Landowners. A mediator from that locality could have facilitated the mediation process according to sub-r 56(2), if the landowners had requested it or had it been recommended because of the mediator's knowledge of the customs of that place and the people and how to communicate effectively with them. This would have been subject to the Oil Palm Company's agreement. With regard to sub -r 46(3), it could also apply in this case in that the mediator would provide advice to both parties and could assist since he was from that locality and would be in a better position to know the needs of both parties. The above is an example of how sub-rule 56(2) and 46 (3) could be applied.

It is therefore concluded that in PNG, depending on the parties involved in the dispute, and the type of dispute parties, the ADR Rules makes provision for custom to apply in the mediation process.

3 Summary

In PNG, it has been reported that 64%³¹⁶ of the cases that have gone through the mediation process have been fully settled which more than 50% is and a positive outcome for the mediation program since it was introduced in PNG and the Pacific as a whole. In Samoa both parties and lawyers, particularly after participating in the process, have also given positive feedback,³¹⁷ even though no accurate data has been provided on how many cases have been fully settled through the program. There have also been failures since the program was introduced which were identified in PNG. In PNG, it was reported that there have mainly been difficulties in enforcement of mediation agreements. In spite of these failures, the Oil Palm Dispute case has demonstrated that mediation can be applied to any culture and could help parties from different cultures to improve their future relationship especially if there had been misunderstanding. Finally, it was shown that customary dispute resolution processes had similar features to the mediation processes, which clearly states that people from the Pacific are familiar with the principles of mediation. The main difference is in the decision making process, which for Samoa and X clan was more adjudicative and followed the modes of litigation and arbitration. However, it is evident from the data provided from PNG that there were other reasons why mediation had failed and it is therefore inferred that even people who are used to the adjudicative systems in Samoa and PNG have adapted to resolving disputes through the mediation process. It was further not reported whether they preferred making their own decisions or not.

Disputants in the cases preferred mediation because they were able to engage in the process, they preferred the remedy, it has helped improve relationships and is seen as less costly and timely. With regard to whether custom would be applicable to resolve commercial disputes or international commercial disputes, it is the author's view that it would depend on the circumstances of the case, for example if it is a sales of good contract between a PNG Company and a New Zealand Company. In that case the mediator is related to A who is the director of the PNG Company but he is also an expert in commercial law. If both parties agree on the request of A that the mediator can mediate, this is where sub-r 56(2) of the Rules could apply. If the mediator provides advice; sub-r46 (3) would be applicable. In this case, the parties have applied the provisions that provide for custom to help solve their dispute.

³¹⁶Murphy "Bilums on the Battle Axe," above n 208 at 1.

³¹⁷ Interview with Maiava Visekota Peteru, President of the Accredited Mediators Association of Samoa (Sheila Sukwianomb, Telephone Conference, 23rd December 2015).

V Enforcement of Mediation Agreements

In the Pacific, the court annexed mediation program³¹⁸ was introduced which provides an avenue to assist parties with enforcing their agreements should parties fail to comply with the terms. From the interviews conducted with mediators in Samoa and PNG it was stated that there have not been any enforcement challenges filed in court. In PNG, there are two main reasons that could explain the absence of challenges. From research conducted for the IFC on how effective the mediation program has been in PNG, there were challenges identified in finalising mediation agreements. Chapter IV, briefly described some of the difficulties experienced.

The main factor that has been identified is, if one of the parties does not have the legal authority to settle it results in an agreement not being drafted and signed. This was experienced in the Oil Palm Dispute where the General Manager did not have the legal authority to settle and required the Company Board's approval for the terms agreed upon with the landowners.³¹⁹ Thus, the terms were agreed in principle but not reduced in writing, which is required under sub-r 12(1) and is a requirement in order to be enforced by the Court. This really frustrated the landowners and was viewed as a hypothetical exercise.³²⁰ Furthermore, this is experienced quite a lot in PNG and is the reason why disputes in mediation are not finalized.³²¹ It usually occurs in disputes where the Government, private companies and landowners are signatories to commercial agreements.³²² For example, if it is a commercial agreement signed with a Government Department where there was a breach of contract. In the mediation process, the Company and the Government's representative have agreed on a substantial sum to settle the dispute but this is subject to Government (National Executive Council) approval as to whether to pay or not it can take a long time to reach a decision on this matter.

Unless the agreement is in writing and signed by both parties and the mediator signs Form 2 of the ADR Rules, which is a Mediator certificate, parties can apply to court to have the agreement enforced. In Samoa, the Samoa Mediation Rules have a similar provision, including the Mediator's Certificate. It would be interesting to see if Samoa was experiencing the same difficulties as PNG. Another issue being faced and perhaps why

³¹⁸ International Finance Corporation, above n 1.

³¹⁹ Murphy "Bilums on the Battle Axe," above n 208 at [9-10].

³²⁰ Above.

³²¹ Murphy, above n 208 at 10.

³²² At [29-30].

mediation settlement agreements are not challenged in court is because of the lengthy process to pursue the enforcement of the agreement, which can be also costly. In the report, it has been recommended that a civil track for cases with mediated agreements be established. It was further argued in that report that mediation is supposed to help resolve disputes in a timely manner and thus going back to court seems to defeat the purpose of its establishment. The above are the reasons why it is difficult to enforce agreements in PNG. There may be other difficulties experienced by other countries in the Pacific with regard to the enforcement of mediation settlement agreements. However, because of the non-availability of data or limited data it is difficult to draw a conclusion as to whether or not parties in the Pacific are facing challenges with their agreements. In regards to the issues being addressed in PNG, the establishment of the civil court track is an administrative matter and which would likely happen once the number of mediation settlement agreements increases. On the issue of a legal authority to settle it appears to be a matter that would continue to occur. However, parties are always advised by the mediator beforehand or prior to the mediation occurring that a party must have authority or come with authority to make decisions.³²³ This could help with finalising the issue especially if representatives are told to come prepared to settle. They can discuss beforehand with their organisation what are type of conditions they are allowed to offer or the maximum amount of money they can offer and work within their limits.

VI Conclusion

Disputes in businesses arise because of misunderstandings, errors, or by a negligent act by one party. Mediation is about bringing people who have made these mistakes or have grievances together so that they can discuss, address the problem face to face, and find solutions. One client in PNG who had gone through the mediation process and was satisfied with the program said:³²⁴

Corporations are not people. There are no hurt feelings. And they don't apologize because an apology is a legal confession. This is the only time a corporation has apologized to me. It would never have happened in a court.

³²³ This is what the author is aware of having participated in two mediations since the mediation program was introduced and has also observed one mediation process as part of mediation training to become fully accredited as a mediator.

³²⁴ Murphy, above n 212 at 21.

The above statement reflects how one person felt about the process. He said he would never have received an apology in court. Through mediation it provides people with the opportunity to get together and engage freely and because of the characteristics provided it enables parties to communicate effectively regardless of where you are from, what position you hold in your job or the status you have in the community. It is the author's view therefore, and from the studies shown, that parties who participate meaningfully and are willing to settle, regardless of where they are from, the type of dispute or how complex it is, with the assistance of a skilled mediator, parties can be helped to resolve any type of dispute. Thus mediation is suitable to the Pacific and will help resolve both domestic and international commercial disputes.

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